

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
April 22, 2008 Session

**STATE OF TENNESSEE, DEPARTMENT OF CHILDREN'S SERVICES v.
GARY DALTON and ANGIE DALTON, v. WILMA RHEA**

**Direct Appeal from the Circuit Court for Hancock County
No. C3133B Hon. Kindall Lawson, Circuit Judge**

No. E2007-01216-COA-R3-JV - FILED JULY 22, 2008

In this action, the parents of the minor child in the custody of the father's aunt by previous proceedings in the Juvenile Court, petitioned the Circuit Court to change the custody from the aunt to them. Following a trial, the Trial Court ruled that the parents did not prove a change in circumstances to enable the Court to vest custody of the child in the parents. On appeal, we affirm.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Circuit Court Affirmed.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the Court, in which CHARLES D. SUSANO, JR., J., and SHARON G. LEE, J., joined.

Denise Terry Stapleton, Morristown, Tennessee, for appellant.

Douglas T. Jenkins, Rogersville, Tennessee, for appellee.

OPINION

In this custody dispute, the parents, Gary and Angela Dalton, petitioned the Court for custody of their daughter Felicia, who was then in the custody of Gary Dalton's Aunt, Wilma Rhea. A trial was before the Juvenile Court for Hancock County, and that Court ruled in favor of Ms. Rhea. The Daltons then appealed to the Circuit Court of Hancock County, where the Trial Judge also determined that custody of the child should remain with Ms. Rhea.

BACKGROUND

On November 26, 2002, the Juvenile Court removed the Daltons' identical twin baby daughters, Felicia and Alicia (d.o.b. July 3, 2001) and Angie Dalton's young son from another relationship, Michael Flenner (d.o.b. March 23, 2000) from the Daltons, and a Petition was filed alleging that the three children were "dependent and neglected children", and that they were suffering from neglect and the parents, who were without a residence, had left the children in various homes. The Petition recommended that the custody of Felicia be given to her great-aunt, Wilma Rhea, and that custody of Alicia be given to her grandmother, Margaret Winkler. On November 26, 2002 the Juvenile Judge entered a Protective Order bringing the children into the protective custody of the Court and placing the children in the temporary custody and care of the family members recommended by the Department of Children's Services.

On December 1, 2002 the Department's case manager and the court appointed guardian ad litem, conducted a home evaluation of the Dalton home as ordered by the Court. The investigators concluded that the parents did not have a suitable home for the children and reported that the father had a criminal record that included multiple charges for assault, domestic violence, DUI, public intoxication and parole violation. The report recommended the children not be returned to their parents.

There was a hearing on December 23, 2002 and the Juvenile Court issued an order on May 9, 2003 that granted full custody of Alicia to Margaret Winkler, full custody of Felicia to Wilma Rhea and full custody of Michael to Keith and Angela Gordan. The Department was released of the temporary custody of the children provided by the November 26, 2002 Order.

A Department case worker re-evaluated the Dalton's situation on May 14, 2003 at the request of the Juvenile Court. The report reflected that neither parent had obtained steady employment but that Mr. Dalton was getting paid for doing remodeling work on a house, and they were living in the single wide mobile home that had been evaluated in December and they were still receiving food stamps. The court considered the DCS report and a report offered by the guardian ad litem at a hearing on June 10, 2003 and entered an Order on June 19, 2003 allowing Michael to be returned to his mother. The order stated that Alicia was to remain in the custody of Mrs. Winkler and Felicia was to remain in the custody of Mrs. Rhea "by agreement of all parties", subject to the parents petitioning the Court for a change in custody status.

On October 27, 2005 the Daltons filed a Petition for Custody in the Juvenile Court for Hancock County asking that full custody of Felicia and Alicia be granted to them. The Petition asserted that the Daltons' position had improved and that they were able to handle the care and maintenance of the two girls, and that they were able to accommodate the girls in their new home. Wilma Rhea filed an Answer asserting that there had not been a material change of circumstances to justify a modification of the Order and that it was in the child's best interest to remain in the custody of Mrs. Rhea. Mrs. Rhea stated that she had full custody of Felicia since Felicia was a new born and that her home was the only home the child had ever known.

On order of the Court another DCS investigation was undertaken, and the Report reflects that the Daltons were living with Michael and their youngest son, Gary Jr. in a four bedroom mobile home that they owned, and that Mr. Dalton was employed full time, earning \$1,920.00 a month and the family received \$174.00 a month in food stamps. According to Ms. Dalton, neither she nor Mr. Dalton were using drugs, but since the last DCS report in 2003, Mr. Dalton had been arrested for vandalism and assault. Mrs. Rhea was interviewed and believed that Felicia should stay with her as she had been with her and that Felicia wanted to stay with her and that the Daltons' visits with Felicia had been irregular and that they had never provided any child support payments. The caseworker expressed concern about the girls returning to their parents in view of Mr. Dalton's criminal behavior, the parent's record with DCS, the reports of irregular visitation by the parents with Felicia and the length of time the girls had been outside the parents' custody.

At trial on March 6, 2006, the Juvenile Court reviewed the procedural history of the case and noted the relinquishment of the children in late 2002 was not voluntary and the children were adjudicated to be dependent and neglected and the children were placed with relatives. The Court noted that the case was reviewed in June 2003, and that the Daltons did not seek to obtain custody of the girls and that the Court ordered that Ms. Rhea have full custody of Felicia. Based on the existence of a valid custody order, the Court ruled that the burden of proof was on the Daltons to show that a material change of circumstances existed. To support this conclusion, the Court relied on *Blair v. Badenhope*, 77 S.W. 3d 137 (Tenn. 2002). The Court said based on the proof as to Felicia, that the interest in maintaining a stable environment with Mrs. Rhea in the only home she had known for five years weighed against any custodial change. Because there was no objection regarding Alicia's custody, the Court ordered that she could return to her parents, and the Court set forth a mandatory visitation schedule for Felicia to stay overnight with her parents and siblings every other weekend and one night during the week. The Court's Order was entered on May 18, 2006 and the Daltons filed a Notice of Appeal to the Circuit Court of Hancock County that day.

The case was heard before the Circuit Court on December 13, 2006, and the Court issued its opinion on February 22, 2007, finding that the Daltons had failed to carry their burden of showing that a material change in circumstances had occurred sufficient to justify a change of custody. The Court further found that a change of custody would not be in the child's best interest. The Daltons appealed to this Court. Without detailing the evidence before the Trial Court, significantly, the Daltons did not produce any evidence that Felicia's circumstances while under the care and custody of Wilma Rhea had materially changed since full custody was given to Ms. Rhea.

The issues on appeal are:

- A. Whether the Circuit Court erred when it denied the Daltons' petition for custody on the ground that the Daltons had not met their burden of showing a material change of circumstances which justified a modification of the Juvenile Court's prior custody order?
- B. In the alternative, if the Court finds that the Daltons did have the burden of

showing a material change of circumstance which justified a modification of the custody order, did the Daltons meet their burden in showing a change in circumstances and that it was in the best interest of the child to modify the custody order and return custody of the child to the Daltons?

- C. Whether the legal standard applied by the Court was agreed to by all the parties, and was thus not an appealable issue?

A trial court's factual findings are presumed to be correct, and will not be overturned unless the evidence preponderates against them. Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn.2001). This Court reviews a trial court's conclusions of law under a *de novo* standard upon the record with no presumption of correctness. *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn.1993). Trial courts are vested with broad discretion in matters of divorce and child custody, and appellate courts will not interfere except upon a showing of erroneous exercise of that discretion. *Hoalcraft v. Smithson*, 19 S.W.3d 822, 827 (Tenn. Ct. App.1999). It is well settled that the Tennessee Constitution protects the fundamental right of natural parents to have the care and custody of their children. *Blair v. Badenhope*, 77 S.W.3d 137, 141 (Tenn.2002). While this right is recognized as fundamental, it is not an absolute right, and the state may interfere with parental rights if there is a compelling state interest. *In re D. D. K.* No. M2003-01016-COA-R3-PT, 2003 WL 23093929 at * 3 (Tenn. Ct. App. Dec. 30 2003).

The Supreme Court, in *Blair v. Badenhope*, set forth a different standard to apply when natural parents are seeking to modify an existing court order that awarded custody to a non-parent. Absent specific extraordinary circumstances, a parent is not afforded the presumption of superior parental rights to custody when seeking to modify a valid court order that properly transferred custody from the parent to a non-parent. *Blair*, at 148. The *Blair* Court explained the rationale for the application of the different standard to a custody modification matter as follows: "Though strong in many respects, no aspect of the fundamental right of parental privacy is absolute, and a parent who is given the opportunity to rely upon the presumption of superior rights in an initial custody determination may not again invoke that doctrine to modify a valid custody order. Absent proof of the custody order's invalidity or proof that the parental rights were not protected in the initial custody proceeding, the child's interest in a stable and secure environment is at least as important, and probably more so, than the parent's interest in having custody of the child returned." *Blair*, at 148. This reasoning also applies to a parent who voluntarily ceded custody to a non-parent when the original custody order was entered and later seeks modification. The application of this standard under the circumstance of voluntary relinquishment of custody presumes that the parent was afforded the opportunity to assert superior parental rights in the initial custody hearing and had knowledge of the consequences of that transfer which effectively operates as a waiver of his or her fundamental parental rights. *Id.* at 147.

When a natural parent seeks a modification of custody in the absence of the special circumstances mentioned in *Blair*, the parent has the burden of showing that a "material change in circumstances" has occurred, which makes a change in custody in the child's best interest. *Id.* (citing

Nichols v. Nichols, 792 S.W.2d 713, 715-16 (Tenn.1990). The burden of establishing these factors rests upon the party seeking the change in custody. *Id.* (citing *Rogero v. Pitt*, 759 S.W.2d 109, 112 (Tenn.1988)).

Appellants' first issue is whether the Circuit Court applied the correct legal standard to the facts presented regarding the modification of the custody order?

The Court of Appeals' role is not to tweak a trial court's custody decision in an effort to achieve a more reasonable result, rather, it is to determine whether the trial court's decision "falls outside the spectrum of rulings that might reasonably result from an application of the correct legal standards to the evidence found in the record." *Parker v. Parker*, 986 S.W.2d 557, 563 (Tenn. 1999).

The Daltons argue that the burden of proof should have been on Mrs. Rhea to show by clear and convincing evidence that Felicia would sustain "substantial harm" if placed in their custody because they should be afforded the presumption of superior parental rights. Specifically, they claim that they never voluntarily relinquished custody, and the custody order was for temporary custody only. Also, that the order is invalid on its face because it did not state that Felicia would be in substantially harm if she were returned to the custody of her parents.

First, the Daltons maintain that the general rule in *Blair* can not apply to their case because they did not relinquish custody of the child voluntarily, but they cite no legal authority to support this position and none was located.¹ *Blair*, sets out the rule regarding modification of a custody order in a dispute between a natural parent and a non-parent as generally applying to all valid custody orders and then states that the rule also applies to situations where the custody order is the result of a natural parent's voluntary consent. *Blair* at 144. The custody order of June 19, 2003 expressly states that the order is made with the "agreement of all parties" and Gary Dalton testified that he agreed that his mother and aunt would take Alicia and Felicia. Accordingly, the Daltons voluntarily ceded custody to the non-parents and this argument is without merit.

Next, the Daltons rely on *In re R. D. H.*, M2006-00837-COA-R3-JV, 2007 WL 2403352 (Tenn. Ct. App. Aug. 22, 2007) to support their argument that the presumption of superior parental rights should apply to them because the court order of November 26, 2002 ceded only temporary custody of the children to the non-parent family members. *In re R. D. H.*, the juvenile court entered an agreed order granting "temporary custody" to the grandmother, and ten years later the mother filed a petition for custody asserting the presumption of superior parental rights. This Court held that because the initial order granted only temporary custody, the mother was entitled to the presumption of superior parental rights and that the mother could only be denied custody of the

¹ "Where a party makes no legal argument and cites no authority in support of a position, such issue is deemed waived and will not be considered on appeal." *Volunteer Concrete Walls, LLC v. Community Trust & Banking Co.*, No. E2006-006020COA-R3-CV, 2006 WL 3497894 at *4 (Tenn. Ct. App. Dec. 4, 2006), *see also* Tenn. R. App. P. 27(a)(7), (b).

child if the grandmother established, by clear and convincing evidence, that the child would be exposed to substantial harm if placed in the mother's custody.

The issue thus becomes whether the Juvenile Court's order of custody of Felicia to Wilma Rhea was a temporary or final order. The November 26, 2002 Order on its face placed the children in the "temporary care and custody" of the non-parent family members and set a preliminary hearing for December 2, 2002. The Juvenile Court record reflects that a hearing was held on December 23, 2002 with all parties present and where evidence was introduced. The Trial Court entered an Order on May 9, 2003 based on its findings at the December 23, 2002 hearing. In that Order the Court stated that:

[I]t is in the children's best interest and IT IS ORDERED:

1. That Margaret Winkler is granted full custody of Aleshia [sic] Dalton.
2. That Wilma Rhea is granted full custody of Fleshia [sic] Dalton.
3. That Keith and Angela Gordan are granted full custody of Michael Fleenor.
4. That the Department of Children's Services is hereby released of the temporary custody of Alesia [sic] and Fleshia [sic] Dalton and Michael Fleenor.

The Court then held another hearing on June 10, 2003 to review the updated DCS report and to consider representations made by the children's guardian ad litem. Following that hearing, the Juvenile Judge entered an order on June 19, 2003, and pursuant to that Order Michael Fleenor was ordered to be returned to the home of his mother Angela Dalton. The order stated that "[b]y agreement of all parties, Alicia Dalton and Felicia Dalton shall remain with their current placements, subject to the parents petitioning this Court for any change in their custody status." This Order establishes that it was a final Order and the Court would take no more action in the matter unless asked to by the parties. Accordingly, appellants' second attempt to establish an extraordinary circumstance under *Blair* fails.

Appellants next argument as to why the general rule stated in *Blair* does not apply is that the Order entered by the Juvenile Court on May 9, 2003 is invalid on its face because it does not contain a finding that substantial harm to Felicia would result if she were returned to the custody of her parents, and rely upon *In re Askew* 993 S.W.2d 1, 5 (Tenn.1999) to support the proposition that for an initial custody order to be valid it must include a finding that the child was at risk of substantial harm substantial and, in the absence of such a finding, deprivation of a parents' custody is a violation of the parents' fundamental constitutional right to have the child in their care and custody. *Askew* at 5.

In re Askew and this case are factually distinguishable. *Askew* concerned a custody contest between a non-custodial mother and the non-related custodian of the child. On petition of the mother for custody, the juvenile court entered an order awarding temporary custody of the child to the non-parent stating that "the Court declines to grant the natural parents custody of the minor

child until such time as they show the Court that they are able to care for the minor child . . . ; that the Court is only delaying restoring custody to the natural parents....; and that the Court is hereby delaying restoration of custody to the natural parents.” *Id.* at 2. This Order was not appealed, and the mother later filed a petition for custody, which was dismissed by the trial court based on a finding that she had failed to meet her burden of proof of showing “changed circumstances”. The Supreme Court reversed the trial court and the Court of Appeals upon finding that the initial order of custody was invalid based on the stated holding of *Adoption of a Female Child* that “a natural parent may only be deprived of custody upon a showing of substantial harm to the child. *Id.* at 4(citing *Adoption of a Female Child*, 896 S.W.2d at 548. The Court stated there was nothing in the order of the Juvenile Court or the record as a whole to show that the juvenile court had made an explicit or implicit finding that the child would suffer substantial harm if she were returned to the custody of her mother. The Supreme Court also found that the order at issue had no suggestion of finality and was in fact a continuance of the case until the juvenile court heard more proof from the mother regarding her fitness to parent her child. *Id.* at 4. Based on the lack of an initial determination by the juvenile court that the child would suffer “substantial harm” if she were in the custody of her mother, the Court concluded that the deprivation of custody of the child “resulted in an abrogation of [the mother’s] fundamental right to privacy.” *Id.* at 5.

Appellant’s reliance on *Askew* is misplaced for several reasons as the facts of the case under consideration are significantly different from the facts in *Askew*. First, their reliance on the May 9, 2003 order as a final order is misplaced. As previously discussed, the Juvenile Court’s actions support a finding that the May 2003 order was still preliminary and that the June 19, 2003 order was the final order as it indicates that “Alicia Dalton and Felicia Dalton shall remain with their current placements, subject to the parents petitioning this Court for any change in their custody status.” In *Askew*, the custody order was found to be only temporary. Second, although neither the June 19, 2003 order nor the record reflect that the Juvenile Court found that Felicia would suffer “substantial harm” if she were returned to the custody of her parents, the order reflects that the decision that Felicia and Alicia would remain with their non-parent custodians was made subject to the “agreement of all parties. The Court of Appeals has addressed the issue of whether a court is required to find “substantial harm” when the parents have agreed to the custody decision of the court *In re R. D. H.* as follows :

Naturally, a court is not required to determine that a parent poses a risk of substantial harm to the child when the parent voluntarily agrees to relinquish custody of the child. *See Baker v. Smith*, No. W2004-02867-COA-R3-JV, slip op. at 8, n. 2 [2005 WL 184847](Tenn. Ct. App. Aug. 5, 2005). Presuming that the parent was afforded the *opportunity* to assert superior parental rights in the initial custody proceeding, then the parent’s voluntary transfer of custody to a non-parent, with knowledge of the consequences of that transfer, effectively operates as a waiver of his or her fundamental parental rights. *Blair*, 77 S.W.3d at 147 (footnote omitted). The Constitution does not again entitle the parent to assert superior parental rights to modify the order even if no court has previously found the natural parent to be unfit.

Id. at 148.

In re R. D. H. 2007 WL 2403352 at * 7.

Under the reasoning of *In re R. D. H.*, the issue here is not whether the Juvenile Court made a finding that Felicia was at risk of substantial harm but whether the Daltons were afforded the opportunity to assert their superior parental rights at the hearing on June 10, 2003 and whether the Daltons understood the ramifications of their agreement. Gary Dalton admitted that he agreed at some point that his aunt Wilma Rhea could help with the care of Felicia, however he denied this arrangement was to be a formal or permanent arrangement. No other evidence on this issue was offered at the Circuit Court trial. There is no transcript of evidence of the Juvenile Court's hearings, and the Daltons had the burden of establishing that they were not afforded the presumption of superior legal rights at the Juvenile Court's hearings. *Blair* at 147-148.

Accordingly, we conclude that the Circuit Court applied the correct standard, i.e., a material change in circumstance, and the evidence does not preponderate against the Trial Court's ruling, Tenn. R. App. P. 13(d). We affirm the Trial Court's ruling that a change of circumstances was not established by the preponderance of the evidence.

For the foregoing reasons, we affirm the Judgment of the Trial Court and remand, with the cost of the appeal assessed to Gary and Angie Dalton.

HERSCHEL PICKENS FRANKS, P.J.